Public Prosecutor v Lee Boon Seng

HIGH COURT (PENANG) — CRIMINAL TRIAL NO 47–5–92
JEFFREY TAN JC
17 JULY 1995

Criminal Law *— Dangerous Drugs Act 1952 (Malaysia) — Trafficking in dangerous drugs — Cannabis — Definition of 'Cannabis' — Whether qualitative tests showed weight of cannabis sufficient to invoke presumption under s 37(da) of Dangerous Drugs Act 1952 — Whether investigation and prosecution evidence irreproachable — Dangerous Drugs Act 1952 s 37(da) & Sch 1*

The accused was riding a motorcycle when ambushed by a party of police officers. Cannabis plant material was found hanging on the ignition key to the motorcycle and also hidden inside his jeans. The government chemist conducted qualitative tests on samples of the material and he found that it contained 392.2g of cannabis in total, which was the total weight of the plant material. The accused was charged with trafficking. The prosecution relied on the presumption under s 37(da) of the Dangerous Drugs Act 1952.

The definition of cannabis applicable in this case was that of 'any part of any plant of the genus cannabis from which resin had not been extracted, by whatever name it may be designated'. The chemist was however unable to say if resin was found on the entire plant material.

It transpired in the proceedings that the motorcycle and the jeans worn by the accused were lost whilst in police custody. Also the exhibits in this case were handled at the same time as the exhibits in another unrelated case without distinguishing markings on them.

Held, amending the charge and convicting the accused of two charges of possession:

(1) The resin in the cannabis had to be substantially intact to be within the definition of cannabis under the Act, and if the resin was not found or to be found in any part of the plant, then that part of the plant devoid of resin, was not cannabis under the Act.

(2) The tests conducted confirmed the preponderant presence of cannabis resin in the bulk of the plant material. However a preponderance of resin in the bulk was not a sufficient basis for equating the weight of the plant material as the weight of cannabis as defined in the Act. The tests were not capable of proving beyond reasonable doubt that resin was present in or on the entire plant material. The prosecution failed to satisfy the court that the weight of the cannabis was sufficient to invoke the presumption under s 37(da).

(3) A trafficking offence was not limited to particular drugs comprised in particular parts but extended to all drugs comprised in the entire Sch 1 to the Act, and therefore it mattered not if 'cannabis' was found in Pt 2 or 3 or both, so long as 'cannabis' was listed in Sch 1. If the prosecution evidence was tending towards proof of cannabis as defined in the Act, it did not matter if the chemist had neglected to state it is not Indian hemp, or indeed of the other drugs comprised in Sch 1.

(4) In a trial involving a capital offence, the prosecution had to build its case on irreproachable evidence. There were features in the investigation of this case that were not salutary, such as the loss of the motorcycle and jeans and the handling of the exhibits. It was dangerous and unsafe to call the defence on the trafficking charge. The charge was amended to two charges of possession.

[Bahasa Malaysia summary

Si tertuduh sedang menunggang motorsikal apabila beliau diserang hendap oleh satu kumpulan pegawai polis. Bahan tumbuhan ganja dijumpai bergantung pada kunci motorsikal itu dan juga dijumpai pada badannya tersembunyi di dalam seluar jean beliau. Ahli kimia kerajaan telah menjalankan ujian kualitatif atas contoh-contoh bahan itu dan beliau mendapati bahawa ia mengandungi sejumlah 392.2g ganja, yang merupakan jumlah berat bahan tumbuhan itu. Si tertuduh dituduh mengedar dadah. Pihak pendakwa bergantung kepada anggapan di bawah s 37(da) Akta Dadah Berbahaya 1952 ('Akta itu').

Takrif 'ganja' yang terpakai di dalam kes ini adalah 'any part of any plant of the genus cannabis from which resin had not been extracted, by whatever name it may be designated'. Ahli kimia itu, namun demikian, tidak dapat menyatakan sama ada resin itu dijumpai pada keseluruhan bahan tumbuhan itu.

Telah diketahui semasa prosiding ini bahawa motorsikal itu dan seluar jean yang dipakai oleh si tertuduh telah hilang semasa dalam jagaan polis. Juga ekshibit di dalam kes ini telah dikendalikan pada masa yang sama dengan ekshibit di dalam satu kes lain yang tidak berkenaan tanpa tanda-tanda yang boleh membezakan mereka.

Diputuskan, meminda pertuduhan dan mensabitkan si tertuduh atas dua pertuduhan pemilikan:

(1) Resin di dalam ganja itu mestilah sebahagian besarnya kekal supaya termasuk di dalam lingkungan takrif 'ganja' di bawah Akta itu, dan jika resin itu tidak dijumpai atau tidak akan dijumpai di dalam apa-apa bahagian tumbuhan itu, maka bahagian tumbuhan itu yang tidak mengandungi resin itu, bukanlah ganja di bawah Akta itu.

A (2) Ujian yang dijalankan mengesahkan bahawa resin ganja wujud pada kebanyakan bahan tumbuhan itu. Walau bagaimanapun, kewujudan resin pada kebanyakan bahan tumbuhan itu bukanlah asas yang mencukupi untuk menyamakan berat bahan tumbuhan itu dengan berat ganja seperti yang ditakrifkan di bawah Akta itu. Ujian itu tidak dapat membuktikan melampaui keraguan munasabah bahawa resin itu wujud di dalam atau pada keseluruhan bahan tumbuhan itu. Pihak pendakwa gagal memuaskan mahkamah bahawa berat ganja itu adalah mencukupi untuk menggunakan anggapan di bawah s 37(da).

(3) Satu kesalahan mengedar dadah tidak terhad kepada dadah tertentu di dalam bahagian-bahagian tertentu tetapi merangkumi semua dadah yang terkandung dalam keseluruhan Jadual 1 Akta itu, dan oleh itu tidaklah menjadi masalah jika 'ganja' didapati di dalam Bahagian 2 atau 3 atau kedua-duanya, asalkan 'ganja' disenaraikan di dalam Jadual 1. Jika keterangan pihak pendakwa cenderung ke arah membuktikan ganja seperti yang ditakrifkan di dalam Akta itu, tidaklah menjadi masalah jika ahli kimia itu gagal menyatakan bahawa ianya bukan hemp India, ataupun dadah lain yang terkandung di dalam Jadual 1.

(4) Di dalam satu perbicaraan yang melibatkan satu kesalahan yang membawa hukuman mati, pihak pendakwa mesti membina kesnya atas keterangan yang tiada cacat cela. Terdapat ciri-ciri penyiasatan kes ini yang tidak begitu baik, seperti kehilangan motorsikal dan seluar jean itu dan pengendalian ekshibit-ekshibit. Adalah merbahaya dan tidak selamat untuk memanggil pembelaan atas pertuduhan pengedaran. Pertuduhan itu oleh itu dipinda kepada dua pertuduhan pemilikan.]

Notes

For cases on trafficking in dangerous drugs, see 4 *Mallal's Digest* (4th Ed) paras 111–182; [1989] *Mallal's Digest* paras 592–621; [1990] *Mallal's Digest* paras 463–467; [1991] *Mallal's Digest* paras 820–849; [1992] *Mallal's Digest* paras 657–672; [1993] *Mallal's Digest* 526–539; [1994] *Mallal's Digest* paras 849–870.

Cases referred to

Choo Yoke Choy v PP [1992] 4 CLJ 1791 (folld)
Khoo Hi Chiang v PP [1994] 1 MLJ 265 (folld)
Leong Boon Huat v PP [1993] 3 MLJ 11 (refd)
Loo Keck Leong v PP [1992] 2 MLJ 177 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), (da), 39A(1), 39B(1)(a), Sch 1
Dangerous Drugs (Amendment) Act 1992 s 2

Yaacob Mohd Sam (Deputy Public Prosecutor) for the Public Prosecutor.

Ranjit Singh (*R Rajasingam & Co*) for the accused.

Jeffrey Tan JC: The accused is on trial for drug trafficking and the charge against him reads as follows:

> Bahawa kamu pada 27hb December 1991, jam lebih kurang 3.05 petang, di sebatang jalan tanah merah besebelahan dengan Taman Burung, Seberang Jaya, di dalam Daerah Butterworth, di dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya, iaitu ganja seberat 392.9g dan dengan demikian kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

The prosecution called eight witnesses and closed its case on 3 July 1995. Both the prosecution and defence ended their submissions on 10 July 1995 with further proceedings adjourned to this day for the court's decision whether to call for the defence.

The primary facts in the prosecution's evidence were as follows:

(a) at 3.05pm on 27 December 1991, a police party led by PPP Abu Shariman (SP2) was waiting in ambush beside a red earth road in the vicinity of Taman Burung, Seberang Jaya, Butterworth when they saw a motorcyclist riding a motor cycle (later said to be bearing registration number PCB 8404) passing by,

(b) one officer from the ambush party pounced on the motorcyclist and with the assistance of the others he apprehended the motorcyclist after a short struggle,

(c) that motorcyclist was the accused,

(d) the ambush party found a plastic bag (P3A) hanging on the ignition key to the motor-cycle. Inside the plastic bag (P3A) were 80 small plastic packets tied in eight bundles, and in each of the 80 small plastic packets was dried plant material (80 small plastic packets marked as P3D1 to P3D80, and the aggregate plant material marked as P3E).

(e) On the accused was found a plastic bag (P4A) containing a compressed block of dried plant material (P4D) wrapped in a Chinese newspaper (P4C).

(f) The two plastic bags together with its contents were sent to a government chemist (SP1) for analysis. The government chemist found dried plant material in the 80 small plastic packets to contain 96.4g of cannabis as defined in the Dangerous Drugs Act 1952, and the compressed block of plant material in the plastic bag P4A to contain 296.5g of cannabis as defined in the Act. He also said cannabis is listed as a dangerous drug in Sch 1 to the Act.

Outwardly, the prosecution's case was simple and straight forward; the accused was caught 'red-handed' with cannabis of a weight in excess of 200g, that brought on the invocation of the statutory presumption

A under s 37(da) of the Act that the accused was trafficking in dangerous drugs.

A presumption of trafficking is however dependent upon proof of possession. There is no statutory definition on possession, but judicial pronouncements on its meaning include invariably some degree of
B custody or control. However, s 37(d) of the Act provides for a presumption of possession (a wider term) upon proof of custody or control (both narrower terms) of anything whatsoever containing the dangerous drug.

On the presumptions under s 37(d), the Supreme Court in *Choo Yoke Choy v PP* [1992] 4 CLJ 1791, per Anuar J (as he then was) said
C at p 1798:

> it was accordingly held that there was no evidence of custody or control of the drugs to raise the presumption under s 37(d) of the Act that the appellants were in possession of the drugs and the further presumption that they must have known that the drugs were cannabis. Unless this can
D be proved, the presumption under s 37(da) of the Act that the appellants were trafficking in drugs did not arise.

Therefore in the present case, to raise the presumption of possession under s 37(d) and then on to the presumption of drug trafficking under s 37(da), there must foremost be the primary evidence of the accused's
E custody or control of the plastic bags (P3A and P4A), the things containing the drugs.

To find the evidence of the accused's custody or control of the two plastic bags containing the cannabis, it was necessary, with the maximum evaluation standard set by the landmark authority of *Khoo Hi*
F *Chiang v PP* [1994] 1 MLJ 265, to scrutinize and test to the utmost at the close of the prosecution's case, all the prosecution's evidence. Accordingly, it was the duty of this court to be satisfied that the prosecution at the close of its case had proved all ingredients of the offence and made out a prima facie case beyond all reasonable doubt that if unrebutted would warrant the accused's conviction. Only with
G such satisfaction can the accused be called upon to enter his defence.

Although the present trial concerns cannabis, a word on heroin and morphine will not be out of place. Heroin and morphine (the other common drugs associated with drug trafficking cases) are analgesic and narcotic drugs derived from opium. There is no legal definition of
H heroin or morphine or indeed of many drugs listed in Sch 1 to the DDA. In trials involving heroin or morphine, the court depends on the findings of the chemist who analysed the incriminating substances, unless there is other evidence to reject his findings.

Unlike heroin and morphine that are more recognisable as 'drugs',
I cannabis is a plant, a hemp plant. In botanical terms, any plant of the genus cannabis is cannabis. However, for offences under the Act, cannabis is clothed with a legal definition, and for cannabis offences, it is the legal definition and not the botanical definition that holds sway and has weight.

Of late in numerous trials concerning cannabis, the chemist's evidence that the plant material 'is cannabis as defined in s 2 of the Act', has been debated even with misgivings whether the pithy statement of the chemist is sufficient proof of cannabis as defined in the Act. It is said that (i) there is a distinction between cannabis as defined in the Act and Indian hemp, and (ii) an omission by the chemist to state that the plant material concerned is not Indian hemp renders a 39B charge untenable.

With effect from 4 September 1992, cannabis has been re-defined by Act 334, that is the Dangerous Drugs (Amendment) Act 1992, to mean

> any part of any plant of the genus cannabis from which there is to be found present resin irrespective of its quantity and by whatever name the plant may be designated (s 2).

For the present trial, the changes brought about by that amendment to the DDA is academic, as the offence for which the accused is tried was one allegedly committed under the old definition of cannabis that reads:

> any part of any plant of the genus cannabis from which resin had not been extracted, by whatever name it may be designated.

Under the latter definition, the onus is upon the prosecution to prove the plant material is of the genus cannabis, and resin had not been extracted from the plant material concerned. The definition gives special emphasis on the extraction or non-extraction of resin, and the non-extraction of resin is an essential ingredient of cannabis related offences. A failure to state whether the plant material concerned had undergone an extraction process, or any uncertainty whether a resin extraction process had been applied, will be regarded as a failure to prove beyond a reasonable doubt that the plant material is cannabis as defined in the Act.

The shortcoming in that definition is that it is silent on the degree of extraction — whether resin had not been totally or substantially or partly extracted — for the plant material as not to be cannabis under the Act.

To a large extent, that shortcoming was judicially removed in *Loo Keck Leong v PP* [1992] 2 MLJ 177 where the Supreme Court per Peh Swee Chin SCJ said at p 181:

> a fairer interpretation of the definition clause in this aspect ought to be that the resin should not have been substantially extracted (but not without a trace in the residue) and not necessarily that the same should have been completely extracted as that the plant material in any particular case for all practical purposes ceases to amount to such a dangerous drug — a harmless substance.

That enunciation by the Supreme Court tacitly suggests that plant material of the genus cannabis substantially extracted of its resin is not cannabis under the Act. Put differently, the resin in the plant material

must be substantially intact, and if resin is not found or to be found in any part of the plant, then that part of the plant devoid of resin, is not cannabis under the Act.

On a less definite footing is the issue of Indian hemp. Much has already been said by many courts on Indian hemp and cannabis as defined in the Act, and it is doubtful if this court can add anything to the voluminous works on the subject found in many learned judgments. However, such judgments that there are on Indian hemp are not in one, and until it is authoritatively resolved by a superior court, trial courts must nonetheless be ready with a ruling. That being so, then it is the considered view of this court that Indian hemp should not be an issue in a cannabis trafficking trial.

An offence for drug trafficking is vastly different from an offence for possession. Section 39B(1)(a) of the Act provides that 'no person shall ... traffic in a dangerous drug', the ingredients being, (i) trafficking and (ii) in a dangerous drug; only in cases lacking the direct evidence of trafficking, will the ingredients of custody control or possession of the drug concerned be needed to prove a trafficking charge.

Trafficking is defined as one of the activities specified in s 2, and a dangerous drug is defined as 'any drug or substance which is for the time being comprised in Sch 1'. Schedule 1 is divided into five parts, and cannabis is listed in both Pt 2 if not in Pt 3 of Sch 1, and comprised, in the Sch 1, cannabis is therefore a dangerous drug.

In a cannabis trafficking offence, the prosecution therefore must prove:

(i) trafficking (any of the activities specified in s 2), and in its absence possession of cannabis of a weight sufficient to invoke the s 37(d) presumption,

(ii) cannabis is listed in Sch 1 to the Act,

(iii) the plant material or other substance concerned is cannabis as defined in s 2 of the Act.

It is not overlooked that 'cannabis' is listed in Pt 2, while 'cannabis (Indian hemp)' is listed in Pt 3, the rationale for a supposed distinction between 'cannabis' and 'cannabis (Indian hemp)'.

With the greatest of respects, Sch 1 is divided in parts for the sole reason that certain offences in the Act relate only to particular drugs comprised in particular parts but not the entire list of drugs comprised in Sch 1. A trafficking offence is not limited to particular drugs comprised in particular parts but extends to all drugs comprised in the entire Sch 1, and therefore matters not if 'cannabis' is found in Pt 2 or Pt 3 or indeed in both, so long as 'cannabis' is listed in Sch 1 (see definition on dangerous drugs). In a trafficking offence it is the trafficking of a dangerous drug comprised in Sch 1; cannabis is comprised in Sch 1, and if the prosecution's evidence is tending towards proof of cannabis as defined in the Act, namely (i) the plant material examined is cannabis as defined in s 2 of the Act, (ii) and cannabis is listed in Sch 1 to the

Act, why then should it matter if the chemist had neglected to state that it is not Indian hemp, or indeed of the other drugs comprised in Sch 1. Even a real difference between cannabis and Indian Hemp is inconsequential for that could only be the elongation of Sch 1 by an additional dangerous drug, that is cannabis (Indian hemp).

With that understanding, it is an opportune moment to marshal and evaluate the evidence of the chemist who analysed the drug exhibits. The chemist received two envelopes marked E1 and E2 containing exhibits for analysis. In E1 he found 80 small plastic packets containing dried plant material, and in E2 he found a compressed block of dried plant material wrapped in a newspaper.

The chemist weighed the 80 small plastic packets together with the dried plant material and the compressed block or dried plant material wrapped in a newspaper and obtained a gross weight. He then removed the plant material from the 80 small plastic packets and the compressed block from the newspaper, and weighed the 80 empty plastic packets and newspaper. Deducting the weight of the 80 empty packets and newspaper from the gross weight, the chemist obtained the weight of the aggregate plant material as 392.9g.

He then loosened all plant material found in E1 and spread it out as evenly as he could, and examined it visually and further with a microscope. He found on the plant material systolic and granular hairs, the characteristics of a cannabis plant.

From that spread of plant material, he removed at random 20 samples weighing 0.3 to 0.6g each (a total of 8.4g), and subjected each sample to the Dequinois Levine Test (DLT). On all 20 samples tested the chemist obtained a positive colour reaction indicating the presence of cannabis resin in the 20 samples.

From the same spread of plant material, the chemist then removed at random another 20 samples weighing 0.3 to 0.6g each (a total of 9.2g), and subjected each sample to a thin layer chromatography test (TLC). From the latter test, the chemist also obtained a positive reaction indicating the presence of cannabis resin in all 20 samples.

He then loosened all plant material found in E2 and spread it out as evenly as he could. Similarly the chemist examined the plant material visually and with a microscope, and found on the plant material systolic and granular hairs, the characteristics of cannabis.

From that latter spread of plant material, he then removed at random 20 samples weighing 0.3 to 0.6g each (a total of 9.8g) and subjected each sample to the Dequinois Levine test (DLT). The chemist obtained a positive colour reaction indicating the presence of cannabis resin in all 20 samples tested.

The chemist then removed at random 20 samples weighing 0.3 to 0.6g each (a total of 9.6g) from that spread of plant material and subjected each sample to a thin layer chromatography test (TLC). He also obtained a positive colour reaction indicating the presence of cannabis resin.

A The chemist declared that from those tests, namely the visual and microscopic examination, the DLT and TLC tests, he found that the plant material was cannabis within the definition of the DDA 1952. The chemist also related what according to him are four resin extraction processes, and said that none of the plant material had undergone any of those resin extraction processes.

B That the plant material was cannabis as defined in the Act could not be doubted. The chemist was a witness of fact, and his conclusions that the plant material is of the genus cannabis and none had undergone an extraction process, must be accepted in the absence of any evidence to the contrary.

C What was in issue however was the weight of cannabis. The Act sets out different penalties for different weight tariffs, and in the case of cannabis, proof of a weight in excess of 200g attracts the presumption of trafficking instead of possession. The weight of drugs in a capital offence trial has therefore been, and understandably so, an undying D issue irascibly contested between chemist and counsel, particularly so if the weight given by the chemist bordered a lesser offence.

While it was crystal clear from the chemist's evidence that cannabis was found in the plastic bags P3A and P4A, it was equally apparent that the chemist adopted the weight of the plant material as the weight of E the cannabis. The Act defines cannabis as 'any part of any plant of the genus cannabis from which resin had not been extracted, by whatever name it may be designated' (old definition). The construction of that definition focuses on 'part of the plant ... which resin had not been extracted', and carries the presumed words where resin is present and extractable such that that 'part of the plant' devoid of resin for extraction F or further extraction is not cannabis as defined in the Act.

Juxtaposed with the interpretation of 'substantial extraction' in *Loo*'s case, cannabis as defined in the Act is 'any part of any plant of the genus cannabis, *where resin is present and extractable* and resin had not been substantially extracted, by whatever name it may be designated'. G (Italics are mine.) The statutory definition of cannabis emphasizes on the extraction of resin, and that speaks eloquently of the legislature's intent that that part of the plant material where resin was not found, is not cannabis as defined in the Act.

The weight of cannabis was given as 392.9g, that is the identical H weight of the total plant material. That given weight would have been accurate if resin was present and extractable from the entire plant material analysed, that is without exception to sundry bits or pieces. However, if the weight of that sundry bit or pieces was not deducted, then the given weight of cannabis would have included the weight of purely harmless plant matter without any resin for extraction.

I The chemist was however unable to say if resin was found on the entire plant material, and in his own words he said, 'I will not be able to say that every square millimetre of the spread was covered with resin', although he testified earlier that the plant material consisted mostly of flowering tops that were full of resin.

Were resin present and extractable from the total plant material? The entire plant material was not chemically tested and the portion or percentage of plant material devoid of resin for extraction was not established.

Admittedly, the results from the DLT and TLC tests on the samples taken at random positively identified the presence of cannabis resin in all samples, and such positive tests confirmed the preponderant presence of cannabis resin in the bulk of the plant material. However, a preponderance of resin in the bulk was not a sufficient basis for equating the weight of the plant material as the weight of cannabis as defined in the Act. The DLT and TLC tests were qualitative tests, solely to identify the presence of resin in a sample. The presence of resin in a sample would undoubtedly give the positive reaction; but such kind of confirmation was only to the presence of resin and not confirmation that the entire sample tested was cannabis as defined in the Act. To illustrate, if a gallon of water with fair drops of arsenic was tested, the presence of arsenic would be detected on every sample tested; yet those tests would not be proof of a gallon of arsenic. Similarly, those TLC and DLT tests confirmed the presence of resin in the sample, and the visual examination confirmed the preponderance of resin in the bulk, but not of resin in the entire plant material. As such, the weight of the total plant material should not be equated as the weight of cannabis defined in the Act. There was the unknown factor of the weight of the harmless material. A visual and microscopic examination carried out on the plant material revealed to the chemist systolic and granular hairs on the entire plant material. However, systolic and granular hair are nothing but the characteristics of cannabis plants and confirmed the plant material as of the genus Cannabis, but was not the absolute and all consummate proof that resin was present in or on the entire plant material examined.

It is not suggested that insufficient quantities of the plant material were chemically tested. (See *Leong Boon Huat v PP* [1993] 3 MLJ 11.) The amount of plant material tested in the instant case was not ambiguous, and was sufficient to identify the presence of resin. However, those four tests were not capable of proving beyond a reasonable doubt that resin was present in or on the entire plant material.

It was argued that the weight of cannabis in this case was not bordering on a lesser offence. Perhaps it was not next to the border; but it was also not so far away that any omission to take into account the weight of harmless plant material would not have given rise to a doubt that the weight of cannabis was undoubtedly above the tariff of 200g.

The prosecution had therefore failed to satisfy the court that the weight of cannabis was 392.9g, or that the weight was beyond all reasonable doubt in excess of 200g.

Nevertheless and beyond any question of doubt, the 80 samples were all tested positive for cannabis resin content, and the combined weight of the total samples established at best 37g of cannabis as

A defined in the Act. (See *Leong Bon Huat v PP* (1993) 3 MLJ 11.) The chemist testified that 100g of plant material would yield between 8g to 12g of cannabis resin; mathematically therefore the balance 355.9g of plant material (deducting 37g from 392.9g) should yield 28.472g to 42.708g of cannabis resin.

B In a trial involving a capital offence where the most extreme of penalties may be exacted, the prosecution must build its case on irreproachable evidence, but the evidence of the arrest, the recovery of P3A and P4A, and the handling of drug exhibits was not that flawless.

Three (SP2, SP5 and SP7) of the six police officers who took part in the arrest testified in court. They were undivided in their testimony C that the rider of the motorcycle PCB 8404 arrested on 27 December 1991 was the accused. They were unanimous that a plastic bag (P3A) was hanging on the ignition key to the motor-cycle. However, not everything they said coincided, for there were different versions on the arrest and the place where P4A was found.

D SP2 testified that 'they' (meaning he and the other officers) approached the accused and SP5 apprehended the accused after the accused had fallen off his motorcycle and tried to escape and after a short struggle between the accused and SP5. SP5 testified that he 'menyerbu' the accused and the accused fell, and thereafter he E apprehended the accused. However, SP7 said it was SP2 'yang serbu dahulu dan lepas itu pasukan bantu mereka'.

On P4A containing the block of compressed plant material, SP2 said he found it tucked inside the jeans worn by the accused. He said it was below the front waistline, that is the place below the navel. SP5 said that SP2 found a yellow bag around the accused's waistline, while F SP7 said a plastic bag was found inside the t-shirt worn by the accused. The handling of the drug exhibits was questioned by the defence. SP2 took possession of the drug exhibits at 3.05pm on 27 December 1991 and had it in his office at around 4.15pm. However, it transpired that at 1pm on the same day, that is two hours before the arrest of the G accused, SP2 had arrested one Ng Chor Ming and had taken into custody other cannabis plant material. Therefore at 4.15pm on 27 December 1991, SP2 had custody of two sets of cannabis exhibits from two unrelated cases. SP2 placed both sets of exhibits in the same steel cabinet on 27 December 1991, after having marked it with identical markings, namely, (i) SP2's initial and (ii) the date 27 December 1991 H At 6.20pm on 27 December 1991, SP2 handed to SP8 the drug exhibits of the instant case. At a time not specified, SP2 also handed to SP8 the drug exhibits recovered in Ng Chor Ming's case. SP8 said that he kept both sets of exhibits in the same cabinet until it was handed simultaneously (on 31 December 1991) to the same chemist (SP1) for I analysis.

There were features in the investigation that were not salutary. That SP2 effected two separate arrests on the same day must be to his credit. That SP8 acting as the common investigation officer and that

the same chemist analysed both sets of exhibits could have been necessitated by the exigencies of personnel. Nevertheless, cannabis was recovered from two separate arrests on the same day (27 December 1991) by the same officer (SP2) and kept in the same cabinet without distinguishing markings until it was handed on to a common investigation officer (SP8) who kept in the same cabinet until it was handed to the chemist (on 31 December 1991), and that required a certain degree of care in the constant separation of the two sets of exhibits to avoid the possibility of any mix-up of the exhibits. A B

The 80 small plastic packets in eight bundles were counted at the place of arrest and the possibility of it being mixed with the exhibits of Ng's case must be remote and was therefore discounted. However, the make-up of the plant material in Ng's case was left unsaid, with possibility therefore that it had a similar appearance as the compressed block of plant material found in the plastic bag P4A. C

Both SP2 and SP8 declared that the exhibits in the present case and that of Ng's case were placed in separate shelves in their respective cabinets. However, no other precautions were taken to avoid the possibility of a mix-up of exhibits. Nor was there any distinguishing markings on the exhibits when it was put inside SP2's cabinet, when it was taken out to be handed to SP8, and when it was inside SP8 cabinet. In the manner in which it was handled, the possibility of a mix-up was real and not speculative; yet the court was not assured by evidence that there was absolutely no possibility of a mix-up of exhibits. D E

The standard of investigation is best exemplified by the loss of the motorcycle PCB 8404 — SP8 said it was lost while it was in his custody — that deprived the court of an opportunity to look at the ignition key switch and key and discern thereby if P3A could be hung as said and if the accused on the motorcycle could have hidden P4A inside his jeans. That pair of jeans worn by the accused was also not exhibited and that further deprived the court of an inspection of the jeans (usually tight fitting) and to measure the possibility of it hiding the compressed block of plant material as said. F G

Quite apart from the evidence of the chemist, the manner of investigation in a capital offence left many unanswered questions:

(1) was P4A found tucked between the jeans and the accused body below the naval, or in a yellow bag (no yellow bag was ever produced) around the waistline or in the t-shirt? H

(2) Who first ambushed the accused — SP2 or SP5?

However, in all fairness, whichever version in (1) and (2) above was true, all material witnesses testified that P4A was found on the accused, and that was sufficient proof of the accused's custody and knowledge of his custody. I

(3) Would the production of the pair of jeans remove the possibility that its wearer could have hidden a compressed block of plant material inside or around the waist.

(4) What yellow bag was SP5 alluding to? Was it the yellow plastic P4A?

Those unanswered questions and the inadequate evidence of the chemist — the best construction which must be given to the accused — had rendered it dangerous and unsafe to call the defence on the trafficking charge.

Still, the court is satisfied that the accused was in possession of the plant material found in E1 and E2 on 27 December 1991, and the plant material is 37g of cannabis and between 28.472 to 42.708g of cannabis resin. The court therefore amends the sole charge of trafficking in 392.9g of cannabis, and calls on the accused to enter his defence to the following two amended charges:

(i) that you on 27 December 1991 at 3.05pm at a red earth road in the vicinity of Taman Burung Seberang Jaya Butterworth in the State of Pulau Pinang was found in possession of not less than 28.472g and not more than 42.708g of cannabis resin in contravention of s 12(2) of the Dangerous Drugs Act 1952, an offence punishable under s 39A(1) of the same said Act.

(ii) that you on 27 December 1991 at 3.05pm at a red earth road in the vicinity of Taman Burung Seberang Jaya Butterworth in the State of Pulau Pinang was found in possession of 37g of cannabis in contravention of s 12(2) of the Dangerous Drugs Act 1952, an offence punishable under s 39A(1) of the same said Act.

The accused pleaded guilty to both the amended charges and was accordingly convicted and sentenced.

Reported by Herman LH Poon